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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 4(g)	)	MM Docket No. 93-8
of the Cable Television	)	
Consumer Protection Act of 1992	)	

REPLY OF RODNEY A. SMOLLA IN SUPPORT OF THE
COMMENTS OF SILVER KING COMMUNICATIONS, INC.

On behalf of Silver King Communications, Inc. ("SKC"), I submit this reply both (1) to highlight the significance to this proceeding of the April 8 decision of the United States District Court for the District of Columbia[1/] upholding the

1992 Cable Act.[3/] That decision has broad implications for this proceeding.

Both the majority opinion, written by Judge Thomas Penfield Jackson and concurred in by Judge Stanley Sporkin, and Judge Sporkin's separate concurrence, emphasize that the must-carry scheme is constitutional largely <u>because it is content neutral</u>: "the must-carry provisions are, in intent as well as form, unrelated (in all but the most recondite sense) to the content of any messages that these embattled cable operators.

irrespective of the position taken on any issues."[6] In light of the district court's heavy emphasis on the content neutrality of the must-carry provisions in reaching the decision that those must-carry provisions do not violate the First Amendment, the

other similarly situated broadcasters.[9] On the record before the Commission, it is plainly wrong to characterize SKC programming as purely commercial speech.[10] As the Supreme Court recently stated, "the interest in protecting the free flow of information and ideas is still present when [noncommercial] expression is found in a commercial context."[11] The distinction CSC endorses based exclusively on the content of the SKC Stations' mixed noncommercial and entertainment programming is thus presumptively unconstitutional.[12]

2. Second, even if the programming of home shopping format broadcasters were properly characterized as commercial speech, CSC seriously understates the level of First

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9/ See Statement of Rodney A. Smolla in Support of the Comments of Silver King Communications, Inc. ("Opening Comments"), at 20-24.

10/ See SKC Comments, at 18-37. For this reason, the cases cited by CSC for the proposition that speech that proposes a commercial transaction can be regulated as commercial speech are inapposite because none of them involved the mix of commercial and noncommercial speech present here. See Board of Trustees of the State University of New York v. Fox, 492 U.S. 469 (1989) (on campus sales presentations regulated as commercial speech); Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) (mailings advertising prophylactics regulated as commercial speech); Central Hudson Gas and Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557 (1980) (advertising intended by utility to promote power usage regulated as commercial speech); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (advertising of prescription drug prices regulated as commercial speech).

11/ City of Cincinnati v. Discovery Network, Inc., No. 91-1200, slip op. at n.21 (U.S. Mar. 24, 1993).

12/ See Opening Comments, at 25-27.

Amendment protection afforded such speech.[13] Just two weeks ago, the Supreme Court reaffirmed in City of Cincinnati v. Discovery Network, Inc. that commercial speech is entitled to substantial First Amendment protection.[14]

The two cases cited by CSC to support its assertion that commercial speech is accorded limited First Amendment protection are inapposite; in both cases the government had a substantial interest in regulating the underlying commercial transactions promoted by, or the incidental harms caused by, the regulated commercial speech.[15] Here, by contrast, CSC proposes that the Commission penalize the SKC Stations based solely on CSC's disdain for the content of home shopping format entertainment programming. There is no suggestion that the government has any interest in regulating the underlying commercial transactions.

13/ See CSC Comments, at 10 (Commercial speech is entitled to "very limited First Amendment protection.").

14/ See Discovery Network, No. 91-1200, slip op. (U.S. Mar. 24, 1993); see also Opening Comments, at 28-30.

15/ Thus, in Posadas de Puerto Rico Assocs. v. Tourism Co. of

3. Finally, even if the Commission could regulate home shopping format programming as commercial speech, no regulation would withstand judicial scrutiny, unless the means used "reasonably fit" a "substantial" governmental interest.[16/] As discussed in my Opening Comments, the intended purpose of section 4(g) is the elimination of home shopping format programming based on a legislative judgment that such programming is of a lower value than other entertainment programming.[17/] It is thus doubtful whether section 4(g) is supported by any legitimate governmental interest, much less a substantial one.

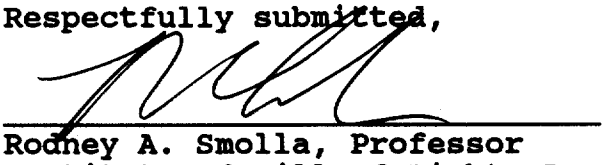
In addition, even assuming CSC could articulate a "substantial" governmental interest, the means CSC advocates are not "narrowly tailored." If, as CSC urges, the Commission were to deny must-carry status to or revoke the licenses of the SKC Stations, the significant locally produced public interest programming they broadcast would be denied carriage or, worse, would be terminated. The exemption from must-carry status thus would run counter to the articulated purpose of the entire must-carry provision -- the encouragement of broadcast localism.

16/ As established in the Opening Comments, at 39-40, this is a formidable standard.

17/ Opening Comments, at 41-42.

Based on the record evidence in the SKC Comments and for the foregoing reasons and the reasons set forth in my Opening Comments, consistent with the Constitution the only conclusion the Commission can reach in these unprecedent proceedings is that the SKC Stations are operating in the public interest, convenience and necessity and therefore are eligible for must-carry status.

Respectfully submitted,

By: 

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Dated: April 27, 1993

CERTIFICATE OF SERVICE

This will certify that an original and nine copies of the foregoing Reply of Rodney A. Smolla in Support of the Comments of Silver King Communications, Inc., were delivered by hand this 27th day of April, 1993, to the following:

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